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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOSE LUIS FRANCESCHY-ROBLES, Defendant.	Criminal Case No. 08CR1903-BEN Date: June 30, 2008 Time: 2:00 p.m. Place: Courtroom 3 The Honorable Roger T. Benitez **UNITED STATES' NOTICE OF MOTIONS AND MOTIONS FOR:** **(1) FINGERPRINT EXEMPLARS;** **(2) RECIPROCAL DISCOVERY; AND** **(3) LEAVE TO GRANT FURTHER MOTIONS**

PLEASE TAKE NOTICE that on June 30, 2008, at 2:00 p.m., or as soon thereafter as counsel may be heard, plaintiff, UNITED STATES OF AMERICA, by and through its counsel, Karen P. Hewitt, United States Attorney, and Joseph J.M. Orabona, Assistant United States Attorney, will move the Court to enter an order granting the following motions.

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MOTIONS

The plaintiff, UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Joseph J.M. Orabona, Assistant United States Attorney, hereby moves this Court for an order granting the following motions for:

1. Fingerprint Exemplars;
2. Reciprocal Discovery; and
3. Leave to File Further Motions

The motions noted above are based on the files and records of this case, together with the a separately captioned statement of facts and memorandum of points and authorities.

DATED: June 23, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ *Joseph J.M. Orabona*
JOSEPH J.M. ORABONA
Assistant United States Attorney

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UNITED STATES DISTRICT COURT

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UNITED STATES OF AMERICA, Plaintiff, v. JOSE LUIS FRANCESCHY-ROBLES, Defendant.	Criminal Case No. 08CR1903-BEN Date: June 30, 2008 Time: 2:00 p.m. Place: Courtroom 3 The Honorable Roger T. Benitez **STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES**

The plaintiff, UNITED STATES OF AMERICA, by and through its counsel, KAREN P. HEWITT, United States Attorney, and Joseph J.M. Orabona, Assistant United States Attorney, hereby files its Motions in the above-referenced case for (1) Fingerprint Exemplars; (2) Reciprocal Discovery; and (3) Leave to File Further Motions. These motions are based on the files and records of this case together with the attached statement of facts and memorandum of points and authorities.

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I

STATEMENT OF THE CASE

On June 11, 2008, a federal grand jury in the Southern District of California returned an Indictment charging Jose Luis Franceschy-Robles ("Defendant") with being a deported alien found in the United States, in violation of 8 U.S.C. § 1326(a) and (b). On June 18, 2008, Defendant was arraigned on the Indictment and pled not guilty. The motion hearing is on June 30, 2008. The United States files the following motions for fingerprint exemplars, reciprocal discovery and leave to file further motions.

II

STATEMENT OF FACTS

A. OFFENSE CONDUCT

On March 26, 2008, at approximately 4:45 p.m., Border Patrol Agent G. Harkins responded to a seismic sensor intrusion device approximately 50 yards north of the U.S./Mexico international border and approximately 5 miles west of the San Ysidro, California, Port of Entry. Agent Harkins arrived in the area and spotted a group of suspected illegal aliens attempting to hide in the thick brush. Agent Harkins approached the group, identified himself as a Border Patrol Agent, and the group fled the scene. After a short foot chase, Agent Harkins apprehended four individuals and performed a field interview of each person – asking each person about their citizenship and their immigration status. All four of the individuals, including one individual later identified as Jose Luis Franceschy-Robles ("Defendant"), freely admitted to being citizens and nations of Mexico without any documentation to enter or remain legally in the United States. Agent Harkins placed all four individuals under arrest and transported them back to the Imperial Beach Border Patrol Station for processing.

At approximately 10:21 p.m., Agent Harkins advised Defendant of his Miranda rights in the English language, and Defendant acknowledged that he understood his rights and that he did not want to speak with the agents without the presence of counsel.

B. DEFENDANT'S IMMIGRATION HISTORY

A records check confirmed that Defendant is a citizen and national of Mexico, and that Defendant was ordered excluded, deported, and removed from the United States to Mexico pursuant to an order issued by an immigration judge on March 12, 2008. Defendant was physically removed from the United States to Mexico on March 12, 2008, which is merely two weeks before the instant arrest. After Defendant's last deportation, there is no evidence in the reports and records maintained by the Department of Homeland Security that Defendant applied to the U.S. Attorney General or the Secretary of the Department of Homeland Security to lawfully return to the United States.

C. DEFENDANT'S CRIMINAL HISTORY

Defendant has an extensive criminal history. The United States propounds that Defendant has at least thirteen criminal history points placing him in Criminal History Category VI. The following is a summary of defendant's criminal history:

CONVICT DATE	COURT OF CONVICTION	CHARGE	TERM
6/02/1998	Cal. Superior Ct. Santa Ana	Cal. Penal Code § 529.5 – Possession of Fake Driver's License (misdemeanor)	3 yrs probation
6/12/1998	Cal. Superior Ct. Orange County	Cal. H&S Code § 11379 – Transportation / Possess for Sale Controlled Substance (felony) 2/26/2002 – Probation revoked	120 days jail, 3 yrs probation 3 years prison
11/30/1999	Cal. Superior Ct. Westminster	Cal. Penal Code § 417 – Exhibit Firearm (misdemeanor)	3 years probation
7/12/2000	Cal. Superior Ct. Newport Beach	Cal. Penal Code § 32 – Accessory to Assault w/ GBI (not firearm) (misdemeanor)	90 days jail
2/26/2002	Cal. Superior Ct. Orange County	Cal. Penal Code §§ 187 and 666 – Attempted Murder (felony)	7 years prison

III

MEMORANDUM OF POINTS AND AUTHORITIES

A. MOTION FOR FINGERPRINT EXEMPLARS

The United States requests that the Court order that Defendant make himself available for fingerprinting by the United States' fingerprint expert. See United States v. Ortiz-Hernandez, 427 F.3d 567, 576-77 (9th Cir. 2005) (Government may fingerprint defendant and use criminal and immigration records in § 1326 prosecution). Identifying physical characteristics, including fingerprints, are not testimonial in nature and the collection and use of such evidence would not violate Defendant's Fifth Amendment right against self-incrimination. United States v. DePalma, 414 F.2d 394, 397 (9th Cir. 1969). See Schmerber v. California, 384 U.S. 757, 761 (1966) (withdrawal of blood is not testimonial).

B. MOTION FOR RECIPROCAL DISCOVERY

The United States hereby requests Defendant deliver all material to which the United States may be entitled under Fed. R. Crim. P. 16(b) and 26.2.

1. Defendant's Disclosures Under Fed R. Crim. P. 16(b)

The United States has voluntarily complied and will continue to comply with the requirements of Fed. R. Crim. P. 16(a). As of the date of this Motion, the United States has produced 56 pages of discovery (including reports of the arresting officers and agents, criminal history reports, documents concerning Defendant's prior convictions, immigration history, and citizenship) and 1 DVD-rom of Defendant's post-arrest interview. The United States has ordered Defendant's A-File, deportation tapes, and some additional criminal history documents. As soon as these materials become available to the United States, the United States will produce any additional discovery. As of the date of this Motion, the United States has not received any reciprocal discovery from Defendant. Thus, the United States invokes Fed. R. Crim. P. 16(b), requiring that reciprocal discovery be provided to the United States.

The United States hereby requests Defendant permit the United States to inspect, copy, and photograph any and all books, papers, documents, photographs, tangible objects, or make copies of portions thereof, which are within the possession, custody or control of Defendant and which Defendant intends to introduce as evidence in his case-in-chief at trial.

The United States further requests that it be permitted to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with this case, which are in the possession or control of Defendant, which he intends to introduce as evidence at the trial, or which was prepared by a witness whom Defendant intends to call as a witness. Because the United States will comply with Defendant's request for delivery of reports of examinations, the United States is entitled to the items listed above under Fed. R. Crim. P. 16(b)(1). The United States also requests that the Court make such order as it deems necessary under Fed. R. Crim. P. 16(d)(1) and (2) to ensure that the United States receives the discovery to which it is entitled.

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2. Witness Statements Under Fed. R. Crim. P. 26.2

Fed. R. Crim. P. 26.2 requires the production of prior statements of all witnesses, except a statement made by Defendant. Fed. R. Crim. P. 26.2 requires reciprocal production of statements, in accordance with the Jencks Act.

The timeframe established by Fed. R. Crim. P. 26.2 requires the statement to be provided after the witness has testified. In order to expedite trial proceedings, the United States hereby requests Defendant be ordered to supply all prior statements of defense witnesses by a reasonable date before trial to be set by the Court. Such an order should include any form in which these statements are memorialized, including but not limited to, tape recordings, handwritten or typed notes and/or reports.

C. MOTION FOR LEAVE TO FILE FURTHER MOTIONS

Should new information or legal issues arise, the United States respectfully requests the opportunity to file such further motions as may be appropriate.

IV

CONCLUSION

For the foregoing reasons, the United States requests the Court grant the United States' Motions for Fingerprint Exemplars, Reciprocal Discovery and Leave to File Further Motions.

DATED: June 23, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

/s/ *Joseph J.M. Orabona*
JOSEPH J.M. ORABONA
Assistant United States Attorney

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. JOSE LUIS FRANCESCHY-ROBLES, Defendant.

Criminal Case No. 08CR1903-BEN

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that:

I, Joseph J.M. Orabona, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the **Notice of Motions and Motions** For (1) Fingerprint Exemplars; (2) Reciprocal Discovery; and (3) Leave to File Further Motions; together with the separately captioned Statement of Facts and Memorandum of Points and Authorities on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

William W. Brown
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Email: bawwb@brownassociateslaw.com
Lead Attorney for Defendant

A hardcopy will be delivered to chambers.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 23, 2008.

/s/ *Joseph J.M. Orabona*
JOSEPH J.M. ORABONA
Assistant United States Attorney